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Kandiah Peter v Public Bank Bhd

SUPREME COURT (IPOH) — CIVIL APPEAL NO 02-534 OF 1991
ABDUL HAMID OMAR LP, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
B 28 OCTOBER 1993

Civil Procedure *— Res judicata — Issue estoppel — Difference in applicable laws — Orders of sale of land made against chargor in foreclosure proceedings — Subsequent application by chargor for declaration that charges were null and void — Whether action was barred by res judicata and estoppel*

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The appellant had charged certain lands to the respondent. The respondent later obtained orders for sale of the appellant's land. The appellant unsuccessfully applied to set aside the orders and subsequently brought an action for a declaration that the charges and
D annexures relating to the land were null and void and for consequential relief. In his statement of claim, the appellant raised and relied on facts and issues which the trial judge found to be identical to those raised by the appellant in the foreclosure proceedings. The trial judge therefore dismissed the appellant's claim on the ground that the matter was covered by the doctrines of estoppel and res judicata. The
E appellant appealed.

Held, allowing the appeal:

(1) A chargee who makes an application for an order for sale in foreclosure proceedings does not commence an action. He merely
F enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. In order for the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree. This requirement is not met by foreclosure proceedings which do not result or terminate in a final judgment or decree.

G (2) Where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought against him by the chargee, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order of sale has been made) and raising in that action the same or similar facts and issues as those raised
H by him in the foreclosure proceedings. Neither res judicata nor cause of action estoppel nor issue estoppel are available to the chargee to meet the chargor's action.

(3) The trial judge was in error when he held that the appellant was estopped by res judicata from raising in the subsequent action the identical issues which he had raised in the foreclosure proceedings.
I The appeal was therefore allowed and a retrial of the action was ordered.

[Bahasa Malaysia summary

Perayu telah menggadaikan tanah tertentu kepada responden. Responden kemudiannya telah mendapat perintah jualan untuk tanah perayu itu. Perayu gagal dalam permohonannya untuk mengetepikan perintah itu, dan kemudiannya telah membawa suatu tindakan untuk mendapat deklarasi bahawa gadaian dan lampiran berkenaan dengan tanah itu adalah batal dan tidak sah dan untuk relief berbangkit. Di dalam pernyataan tuntutannya, perayu telah menimbul dan bersandarkan kepada fakta dan isu yang hakim perbicaraan berpendapat adalah serupa dengan fakta dan isu yang telah ditimbulkan oleh perayu itu di dalam prosiding sekat-tebusan itu. Oleh itu, hakim perbicaraan telah menolak tuntutan perayu atas alasan bahawa doktrin estoppel dan res judicata terpakai dalam perkara itu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Seseorang pemegang gadaian yang membuat permohonan untuk mendapat perintah jualan di dalam prosiding sekat-tebusan tidak memulakan suatu tindakan. Beliau hanya menguatkuasakan haknya sebagai pemegang gadaian dengan menggunakan remedi statutori terhadap penggadai yang ingkar. Sebelum doktrin res judicata, estopel kausa tindakan atau estopel isu boleh terpakai, prosiding yang terlebih awal itu mesti menghasilkan suatu penghakiman atau dekri muktamad. Keperluan ini tidak dipenuhi oleh prosiding sekat-tebusan yang tidak terjumlah atau tamat dengan suatu penghakiman atau dekri muktamad.

(2) Di mana seorang penggadai menimbulkan isu dan bergantung kepada fakta untuk menunjukkan 'sebab sebaliknya' di dalam prosiding yang di bawa terhadapnya oleh pemegang gadaian, beliau tidak dihalang daripada membawa tindakan baru terhadap pemegang gadaian itu (meskipun suatu perintah jualan telah dibuat) dan menimbulkan di dalam tindakan itu fakta dan isu yang sama atau seakan-akannya sama dengan yang telah ditimbulkan olehnya di dalam prosiding sekat-tebusan. Res judicata atau estopel kausa tindakan atau estopel isu tidak boleh digunakan oleh pemegang gadaian untuk menjawab tindakan penggadai itu.

(3) Hakim perbicaraan telah tersilap apabila beliau memutuskan bahawa perayu telah diestop oleh res judicata daripada menimbulkan isu yang sama di dalam tindakan kemudiannya seperti yang telah ditimbulkan olehnya di dalam prosiding sekat-tebusan itu. Oleh itu, rayuan itu dibenarkan dan suatu perbicaraan semula tindakan itu diperintahkan.]

Notes

For a case on res judicata on the ground of difference in applicable laws, see 2 *Mallal's Digest* (4th Ed) para 1962.

Cases referred to

1 *VRKRS Chettiappah Chetty v Raja Abdul Rashid Ibni Almarhum Sultan Idris* [1933] MLJ 18 (folld)
2 *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 (refd)
3 *Mercantile Bank of India v TF Egan & Anor* [1940] MLJ 288 (refd)
4 *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 (refd)

Appeal from: Civil Suit No 22–385–89 (High Court, Ipoh)

G Sri Ram (*Chan Kok Keong* with him) (*Chan & Associates*) for the appellant.

Kerpal Singh (*John Concisom* with him) (*Concisom & Co*) for the respondent.

Eusoff Chin SCJ (delivering the grounds of judgment of the court): This appeal raises a short but important point. At the conclusion of arguments, we allowed the appeal and ordered a retrial. We now give our reasons for doing so.

Facts

The facts so far as are relevant to this appeal are as follows:

The appellant had charged certain lands to the respondent in circumstances which we do not propose to elaborate on in view of the order for retrial we have made. Those circumstances sufficiently appear in the judgment of the learned trial judge.

By two originating summons (which, for convenience, we will refer to in this judgment as 'the foreclosure proceedings') taken out by the respondent (as chargee/plaintiff) against the appellant (as chargor/defendant), the respondent applied for orders for sale of the appellant's lands. The applications were made pursuant to the provisions of s 256 of the National Land Code 1965 (hereinafter 'the Code'). Orders for sale were granted by the court. The appellant had unsuccessfully applied to set aside one of these orders for sale and had with equal lack of success resisted the making of the other order.

Having failed, the appellant, on 23 November 1989, took out the writ in the present action claiming, inter alia, for a declaration that the charges and annexures relating to the appellant's lands are null and void, and for consequential relief. In his statement of claim, the appellant raised and relied upon facts and issues which the learned judge found to be identical to those raised by the appellant in the foreclosure proceedings under s 256 of the Code. In the circumstances, the learned trial judge, after hearing oral evidence and submissions, dismissed the appellant's claim mainly, if not solely, on the ground that the matter was covered by the doctrines of estoppel and res judicata.

Having read the cause papers in the foreclosure proceedings and having compared them with the statement of claim, all of which are contained in

the record of appeal, we are in agreement with the learned judge on his finding that the issues raised by the appellant in the foreclosure proceedings and in the present action are indeed identical. The only question that remains is whether the doctrines of issue estoppel or cause of action estoppel or res judicata are applicable in these circumstances to bar the appellant's present action.

The law

The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are called from several decisions of our courts which have correctly stated the law upon the subject. In *VRKRS Chettiappah Chetty v Raja Abdul Rashid Ibni Almarhum Sultan Idris*,[1] the appellant (chargee) had taken a summons under s 149 of the Land Code 1926 for an order of sale of the charged premises. The respondent pleaded that he could not be sued because there was an Order in Council dated 8 January 1888 which stated:

> No Member of the Royal Family of Perak (Waris Negri) is liable *to be sued for debt* in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident. (Emphasis added.)

Apparently no permission had been obtained as required by the Order in Council. Thorne Ag CJ in the Court of Appeal held [at p 19]:

> It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.
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> ... I am of opinion that the notification has no application whatsoever to the case of the chargee's application under s 149 of the Land Code. The applicant does not commence an action or suit and does not file a plaint. He does not therefore 'sue' in the ordinary acceptance of that term. Certain it is that the chargee does not 'sue for debt', but he applies for leave to exercise his rights as a chargee. *The proceedings result not in a judgment or decree, but in making or refusal of an order of sale.* (Emphasis added.)

That decision was followed in *Murugappa Chettiar v Lechumanan Chettiar*;[2] *Mercantile Bank of India v TF Egan & Anor*;[3] and *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd.*[4]

A It is equally settled law that in order for the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a *final* judgment or decree; 16 *Halsbury's Laws of England* (4th Ed) para 1519. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree.

B In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in C the foreclosure proceedings. Neither res judicata nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

Accordingly, we find that the learned judge was in error when he held that the appellant was estopped, inter alia, by res judicata, from raising in the subsequent action the identical issues which he had raised in the D foreclosure proceedings.

Conclusion

In the circumstances, we made the following orders:

E (i) that the appeal be allowed;
(ii) that the order of the learned trial judge dismissing the suit be set aside;
(iii) that there be a retrial of the action; and
(iv) that the costs of the first trial, this appeal and the retrial do follow the event of the retrial.

F *Order accordingly.*

Reported by Prof Ahmad Ibrahim

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